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No. 71-216

In the Supreme Court of the United States

OCTOBER TERM, 1971

MARSHALL G. WEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is not yet reported (Pet. App. I).

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1971. The petition for a writ of certiorari was filed on August 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support the conviction.

423-023—71

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted of mail fraud in violation of 18 U.S.C. 1341 and sentenced to eighteen months' imprisonment. The court of appeals affirmed, *per curiam* (Pet. App. I).

The government's evidence showed that petitioner and co-defendants David George and Richard Morgan were principal stockholders and officers of the West Virginia Discount Furniture Corporation located in Pineville, West Virginia (Tr. 4–5(a)). Mrs. Bonnie Patrick, the corporation's secretary, testified that she typed a financial statement for the corporation and, at George's direction, took it to petitioner's office and waited there while he looked it over (Tr. 82–83, 84–87). The statement showed the corporation's ownership of a parcel of land which in fact it did not own (Pet. 2, Tr. 76–77, 79–80, 131–132, 186).

Some copies of the statement were placed in the mail. One copy of the statement was received by the Delmonico International Corporation, which, on the basis of the financial statement it received, shipped merchandise to Discount Furniture on credit (Tr. 20, 22). Mrs. Patrick could not recall whether she had mailed a copy of the financial statement to Delmonico (Tr. 88, 90). John Blache, Delmonico's credit manager, testified that Discount Furniture's financial statement came to him from the company's mail room (Tr. 8). He conceded the possibility that the statement could

have been delivered to Delmonico, as he personally did not open the mail (Tr. 6, 9, 20, 32), but testified that, in normal company procedure, all correspondence is opened by personnel in the mail room and is then delivered to the addressee. Anything hand delivered would have been given directly to the addressee by the person delivering it (Tr. 31).

Petitioner's motion for judgment of acquittal at the close of the government's case was denied. Co-defendant George then testified that in April 1967 he learned that a financial statement showing the assets and liabilities of the corporation was necessary to secure credit in the corporation's name. George testified that neither he nor co-defendant Morgan knew how to prepare such a statement, but that petitioner had said that "he'd get one fixed up for us." Shortly thereafter petitioner gave George a draft statement which he had prepared. Petitioner told George to have the corporation's secretary type up the draft. He said that the statement "would get us credit anywhere" (Tr. 234–235). When George asked petitioner about the real estate, petitioner said that he owned the building and that "nobody would ever say anything about it anyway" (Tr. 236).

ARGUMENT

Petitioner argues that, at the close of the government's case, there was insufficient evidence to show his implication in the fraud and, in addition, that he should not be deemed to have waived the motion to acquit by putting on an affirmative case. As petitioner

acknowledges, his assertion with respect to waiver is contrary to the general rule.[1] In any event, evidence of petitioner's interest in the corporation and of his checking over the false statement and indicating his recognition of its falsity were sufficient to make out a *prima facie* case. With respect to the mailing, the sufficiency of the proof of which petitioner challenges, proof may be made either by direct or circumstantial evidence. *United States* v. *Hopkins*, 357 F.2d 14 (C.A. 6); *Whealton* v. *United States*, 113 F.2d 710, 713 (C.A. 3). In light of Mrs. Patrick's testimony concerning the mailing of some of the copies and Blanche's testimony about the receipt of the financial statements, there was ample circumstantial evidence from which the jury could reasonably have inferred fraudulent use of the mails.

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[1] In *Cephus* v. *United States*, 324 F.2d 893 (C.A.D.C.), relied on by petitioner, the court was concerned with circumstances in which a defendant, in seeking to explain, impeach or rebut his co-defendant's testimony, "overshot" his mark and tended to cure a deficiency in the government's case. The court in *Cephus* recognized the continuing validity of the waiver doctrine but objected to its application under those circumstances.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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